

21 Nov. 1972

ORDER SUPPLEMENTING PRETRIAL ORDER NO. 2

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORKUNITED STATES OF AMERICA,  
Plaintiff,

v.

INTERNATIONAL BUSINESS  
MACHINES CORPORATION,

Defendant.

Civil Action

69 Civ. 200

(DNE)

ORDER SUPPLEMENTING PRETRIAL ORDER NO. 2

The Court having entered Pretrial Order No. 2 dated March 21, 1972 and the defendant having brought a motion dated October 12, 1972, under Rules 34 and 37 of the Federal Rules of Civil Procedure, to compel the plaintiff to produce documents from the sources and in the manner as set forth in said motion; and

The plaintiff having filed its opposition thereto on October 26, 1972; and

The parties having settled some of the items in such motion as set forth in a stipulation submitted to the Court on October 30, 1972; and

The Court having heard argument on the motion on October 30, 1972; and

The Court having directed the parties to meet to resolve and dispose of as many of the remaining items of said motion as possible; and

The parties having met and resolved additional items in said motion as set forth in the stipulation dated November 17, 1972; and

The Court being duly advised of the action taken by the parties;

IT IS HEREBY ORDERED, that in the subsequent production of documents by the plaintiff pursuant to Pretrial Order No. 2, plaintiff shall:

1. Produce all the documents described in the attached Schedule A, which is identical to Schedule 2 attached to Pretrial Order No. 2;

2. Produce all such documents contained in any file or elsewhere, including but expressly not limited to

- (a) Storage files
- (b) Correspondence files
- (c) Central files
- (d) Project files
- (e) Contract files
- (f) User files
- (g) Policy files
- (h) Personal and desk files
- (i) Chronological files

3. Produce all documents in their original file folders or, if removed from any file folder or other location, state the label or name on the folder or location;

4. Prior to or in connection with any production, provide information as to the source of each file or file folder with the production;

5. Produce such documents reasonably concurrently from all locations of each agency;

6. Advise the defendant in writing when the plaintiff has completed document production under Pretrial Order No. 2 as to each agency;

7. Provide with respect to all production to date a list of all responsive documents withheld on the claim of privilege, in the form attached as FORM A hereto, within sixty (60) days from the entry of this Order and, as to all subsequent productions, provide such list within sixty (60) days after completion of production from each agency, or as soon thereafter as possible.

/s/ David N. Edelstein  
David N. Edelstein  
Chief Judge

New York, New York

Dated: November 21, 1972

Schedule A

In interpreting each paragraph of this schedule, the following definitions shall apply:

Competitor/Competition: Competitor and competition include past, present and potential competitors and competition.

Electronic Data Processing Product or Service: Electronic Data Processing Product or Service includes any product or service which is peculiar to and an integral part of an electronic data processing system.

Supplier of Any Electronic Data Processing Product or Service: Supplier of Any Electronic Data Processing Product or Service includes each person, including the United States, which supplied or supplies or has offered to supply any electronic data processing product or service.

Electronic Data Processing System: An electronic data processing system consists of a machine or a group of automatically intercommunicating machine units capable of entering, receiving, storing, classifying, computing and/or recording data, which system includes at least one central processing unit and one or more storage facilities, together with various input and output equipment.

Documents requested herein shall be those dated, issued or published from January 1, 1961 to January 1, 1972.

Documents To Be Produced

1. The following documents concerning any supplier of any electronic data processing system:

(a) analyses, appraisals, studies, reports or surveys relating to the relative strengths or weaknesses of that supplier in any segment of the electronic data processing industry, or the relative growth, profits or position of that supplier in such industry;

(b) analyses, appraisals, studies, reports or surveys relating to the history of any such supplier in any segment of the electronic data processing industry, including its entry into or exit from any part of that industry and any barriers, deterrents (or the lack thereof) to such entry or exit.

2. All analyses, appraisals, studies, reports or surveys relating to any electronic data processing system, or basic major part thereof, which relate to:

(a) any evaluation thereof, including the history, life span, availability, performance or specifications of such products (but excluding mechanical, maintenance and day-to-day performance matters);

(b) any comparison involving, or competition between, any such product and any other product;

(c) the number, kind or variety thereof available;

(d) any substantial technological change in or cancellation or withdrawal thereof.

3. All analyses, appraisals, studies, reports or surveys relating to the procurement or use of any electronic data processing system, or basic major part thereof, by any customer including any governmental agency with respect to:

(a) the organization, management, evaluation, selection, transfer or disposal of such product by such customer;

(b) the capacity or willingness, or lack thereof, of any such customer to purchase or lease any such product from any supplier or to itself make, perform or supply any such product thereof instead of or in addition to its existing or then existing supplier;

(c) the ability or capacity, or lack thereof, of any such customer to use, evaluate or select among, or to transfer or dispose of, any such product;

(d) the prices, terms, or conditions for any electronic data processing product offered, negotiated, considered, sought, accepted or rejected by any such customer.

4. All analyses, appraisals, studies, reports or surveys relating to any electronic data processing product or grouping thereof which show or tend to show the market or segment of commerce in which such products compete including, but not limited to:

(a) the existence of a definable "market", "submarket" or "part" of commerce in which such products compete;

(b) the identity or nature of any product, service, supplier, purchaser or customer therein;

(c) the nature, extent or effectiveness of competition therein;

(d) the relative or absolute position of any supplier therein;

(e) any market power of any supplier of any electronic data processing product or service therein;

(f) any acquisition or maintenance or any attempt or intent to acquire or maintain market power therein;

(g) any possibility or probability that any supplier of any electronic data processing product or service might or may injure or destroy competition therein or acquire or maintain any market power therein;

(h) any act, policy, practice, course of conduct, dealing or transaction which might accomplish or contribute to the injury or destruction of competition or the acquisition or maintenance of market power therein.

5. All documents which show any request or demand by any customer, including any governmental agency, for prices or a pricing system whereby two or more electronic data processing products or services are included in a single price.

6. All documents relating to any announcement by any supplier of a new electronic data processing product or service, or a change or modification of a prior announced electronic data processing product or service, including:

(a) the time, timing or content of such announcement;

(b) any change in or cancellation of any electronic data processing product or service or any specification or capability thereof;

(c) the satisfaction or failure to satisfy any test or other standard;

(d) any manner in which such announcement was premature in terms of the design, development or availability of such product or service.

7. All documents which show the percentage return (whether profit or loss) on investment, or on revenue realized or anticipated, by any supplier of any electronic data processing product or service on any such product or service or the relationship any such return has or has not to any average or standard of comparison or to the return on any other data processing product or service.

8. All documents which show any giving or offering by any supplier of any electronic data processing product or service of a price, product, service, term, condition, financing arrangement, or other consideration to any customer which is not offered or otherwise made available to all customers.

Form for Lists of Responsive Documents Withheld on a Claim of Privilege

| <u>Date</u> | <u>Author</u> | <u>Addressee(s)</u> | <u>Source</u>   | <u>Persons Copied</u> | <u>Type of Privilege Claimed</u>                         |
|-------------|---------------|---------------------|---|-----------------------|--|
|             |               |                     | (E.g., files of John Doe, Chief of Computer Division) |                       | (E.g., attorney-client; work product; national security) |

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| UNCLASSIFIED                        |                            | CONFIDENTIAL             |              | SECRET                                  |      |
| <b>OFFICIAL ROUTING SLIP</b>        |                            |                          |              |   |      |
| TO                                  | NAME AND ADDRESS           | DATE                     | INITIALS     |   |      |
| 1                                   | The Director               | 19 DEC 1972              | [Signature]  |   |      |
| 2                                   | Mr. Houston                |                          |              |   |      |
| 3                                   |                            |                          |              |   |      |
| 4                                   |                            |                          |              |   |      |
| 5                                   |                            |                          |              |   |      |
| 6                                   | OGCSUBJ: LITIGATION, CIVIL |                          |              |   |      |
| <input checked="" type="checkbox"/> | ACTION                     | <input type="checkbox"/> | DIRECT REPLY | <input type="checkbox"/> PREPARE REPLY  |      |
| <input type="checkbox"/>            | APPROVAL                   | <input type="checkbox"/> | DISPATCH     | <input type="checkbox"/> RECOMMENDATION |      |
| <input type="checkbox"/>            | COMMENT                    | <input type="checkbox"/> | FILE         | <input type="checkbox"/> RETURN         |      |
| <input type="checkbox"/>            | CONCURRENCE                | <input type="checkbox"/> | INFORMATION  | <input type="checkbox"/> SIGNATURE      |      |
| <b>Remarks:</b>                     |                            |                          |              |   |      |
| FOLD HERE TO RETURN TO SENDER       |                            |                          |              |   |      |
| FROM: NAME, ADDRESS AND PHONE NO.   |                            |                          |              |   | DATE |
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